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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEROME BROUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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81 pp

QUESTIONS PRESENTED

1. Whether 21 U.S.C. § 841 is constitutional in light of this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) when Congress intended that the facts in the "Penalties" portion of § 841(b) were not to be determined beyond a reasonable doubt, and every circuit court of appeals prior to *Apprendi* construed § 841 to mean that Congress intended that the facts in § 841(b) be proven only by a preponderance of the evidence?

2. Whether a criminal defendant's Due Process rights are violated when the Government charges essential facts on drug quantity in the indictment that are not proven beyond a reasonable doubt at trial, but are established at sentencing by a preponderance standard and then affirmed on appeal based on the conclusion by the court of appeals that the drug addict testimony at trial would have satisfied the beyond a reasonable doubt standard?

3. Whether the plain error standard applies to review *Apprendi* error when the Government charged drug quantity in the indictment, made no effort to prove drug quantity at trial beyond a reasonable doubt and the defendant timely moves for acquittal pursuant to Fed. R. Crim. P. 29(1)?

4. Whether a conviction and the accompanying special assessment on one count of a two count indictment can stand when the count of the indictment charged elements of the offense that were never proven at trial or addressed on appeal?

PARTIES IN THE COURT BELOW

The parties in the Court below are contained in the caption. There is no party with an interest to disclose pursuant to Rule 29(6).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jerome Brough seeks review of a decision of the United States Court of Appeals for the Seventh Circuit affirming his conviction and sentence entered by the United States District Court for the Eastern District of Wisconsin.

OPINIONS BELOW

The opinion of the court of appeals is reported at 243 F.3d 1078 (7th Cir. 2001), and is reproduced at Pet. App. 1a. The order denying rehearing is reproduced at Pet. App. 7a.

The Superseding Indictment, Judgment and oral statement of reasons for conviction are unreported and reproduced as Appendices C through E.

JURISDICTION

The decision of the court of appeals was issued on March 22, 2001. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. The order of the court of appeals denying a timely request for rehearing was issued on April 19, 2001. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Due Process Clause of the United States Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . ". U.S. Const. amend. V.

Section 841 of the Comprehensive Drug Abuse and Control Act of 1970, 21 U.S.C. § 841, is reproduced in Appendix F, starting at Pet. App. 38a.

STATEMENT OF THE CASE

Petitioner, Jerome Brough was indicted in the United States District Court for the Eastern District of Wisconsin for conspiracy to possess with the intent to distribute and to distribute drugs. (Pet. App. 22a-23a.) No drugs were seized on Mr. Brough when he was arrested. (PSR p. 13, ¶ 47.)

Count One alleged that the conspiracy involved "in excess of one (1) kilogram of heroin." (Pet. App. 22a-23a.) Count Two alleged that the conspiracy involved "in excess

of 50 grams of cocaine base, commonly known as crack." (Pet. App. 22a-23a.)

Mr. Brough waived a jury trial and proceeded with a bench trial. At the close of evidence, Mr. Brough moved for acquittal pursuant to Fed. R. Crim. P. 29(a). (Tr. 1182:3-5.) On February 4, 2000 Mr. Brough was convicted on both counts of the indictment. (Pet. App. 8a.)

At trial, the district court did not make any findings as to drug quantity. (Pet. App. 24a.) There were no controlled buys of crack cocaine; rather, the drugs that were seized during the investigation were from drug houses that were associated with gang activity. (Tr. 480:5 – 481:16.) The Government concluded that Mr. Brough was not associated with a gang. (PSR at p. 20; PSR Corrections, p. 1, ¶5.) Mr. Brough's fingerprints were not found on the seized drugs or packaging materials, and packaging materials were found even though the Government theory was that the drugs from Mr. Brough were pre-packaged. (Tr. 729:17 – 730:2.)

At the sentencing hearing, the Government established drug quantity by relying on "estimates," "extrapolations," "averages" and "picking middle grounds" all based on a preponderance of the evidence. (Sent. Tr., pp. 42:14-17; 45:5-14; 49:24-50:3; 57:4-8; 92:15-19.) Mr. Brough objected to the procedure, and the district court stated that it was relying on this lower standard to determine drug quantity:

> THE COURT: The Government has to show by a preponderance of the evidence the drug quantities it's relying upon. Ordinarily what that means is it must first show that something is more likely than not.

(Sent. Tr., p. 34:5-9.)

On June 22, 2000, Judgment was entered. Mr. Brough was sentenced to two concurrent life sentences based on drug amounts proven by a preponderance of the evidence. The Judgment contained no finding as to drug quantity. (Pet. App. 24a.) Four days later, on June 26, 2000, this Court handed down its decision in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S. Ct. 2348 (2000).

The Seventh Circuit affirmed the conviction and sentence. The Seventh Circuit held that § 841 was constitutional despite the structure of the statute bifurcating the offense from the penalties. (Pet. App. 2a-4a.)

The Seventh Circuit applied the plain error doctrine even though Mr. Brough had timely moved for acquittal pursuant to Fed. R. Crim. P. 29(a) and the Government failed to prove drug quantity at trial beyond a reasonable doubt. (Pet. App. 4a-5a.)

To affirm the conviction and sentence, the Seventh Circuit re-weighed the evidence on quantity of crack now using the beyond the reasonable doubt standard (Count II), but reached no conclusion as to whether the evidence on Count I supported a finding beyond a reasonable doubt of over 1 kilogram of heroin. (Pet. App. 5a.)

The court of appeals denied Mr. Brough's petition for rehearing. Pet. App. 7a.

REASONS FOR GRANTING THE WRIT

Petitioner, Jerome Brough, has been ordered to spend the rest of his natural life in prison. This order is not based on a finding at trial, but is based on conclusions at a

sentencing hearing by a preponderance of the evidence that on appeal the court of appeals thought as to one count (but not the other) would have constituted proof beyond a reasonable doubt had the Government attempted that proof at trial.

This Writ should be granted pursuant to Supreme Court Rule 10(c) to address the important questions raised by this conviction and the criminal procedure stemming from this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000).

The first question is whether 21 U.S.C. § 841 is constitutional in the wake of *Apprendi*. Justice Breyer expressed constitutional concern about statutes like § 841 in his dissenting opinion. 530 U.S. at 565. Courts of appeal had expressed this same concern prior to *Apprendi*, but did not reach the question because they uniformly interpreted the facts in § 841(b) as sentencing factors. *E.g.*, *United States v. Jackson*, 207 F.3d 910, 920 (7th Cir. 2000). After *Apprendi*, the courts of appeal reversed course and held that the facts in § 841(b) are elements that must be proven beyond a reasonable doubt. *E.g.*, *United States v. Nance*, 236 F.3d 820 (7th Cir. 2000). In reaching that conclusion the courts of appeal have abandoned their prior concerns about the constitutionality of § 841 in light of this new interpretation. This Court's guidance is essential.

The second important question stemming from *Apprendi* is the proper role of the court of appeals in light of this Court's directives in *Sullivan v. Louisiana*, 508 U.S. 275 (1993). The indictment charged drug quantity sufficient for a life sentence, but the government conceded that it did not attempt to prove quantities at trial or sentencing beyond a reasonable doubt. Although urged to do so on appeal, the Seventh Circuit did not reverse or remand, but thought that

Apprendi allowed it to review the trial evidence based on plain error and determine what would have happened at trial had the government attempted to prove quantity beyond a reasonable doubt. This procedure improperly substituted the appellate judgment for the trial court on facts that make the difference between a 20 year sentence and a life sentence.

The third important question stemming from *Apprendi* concerns the quality of proofs necessary to determine drug quantity beyond a reasonable doubt. Prior to *Apprendi*, and in the context of the preponderance of the evidence scheme, court of appeals had questioned the use of life long drug addicts and paid informants to establish drug quantity. *United States v. Beler*, 20 F.3d 1428 (7th Cir. 1994); *United States v. Rodriguez*, 73 F.3d 161 (7th Cir. 1996) (*en banc* dissent), *United States v. Sepulveda*, 15 F.3d 1161, 1198 (lst Cir. 1993). The quantity proof here was based on estimates and extrapolations from life-long heroin and crack addicts. This violates defendant's Due Process right to be sentenced on the basis of reliable evidence. *In re Winship*, 397 U.S. 358, 363-63 (1970); *United States v. Campbell*, 985 F.2d 341, 348 (7th Cir. 1993). Now that *Apprendi* demands proof of quantity beyond a reasonable doubt, this question becomes exceptionally important to examine and resolve.

Finally, the Seventh Circuit raised important questions about the concurrent sentencing doctrine. *Ray v. United States*, 481 U.S. 736 (1987). While re-examining the evidence on appeal using the beyond a reasonable doubt standard, the Seventh Circuit decided not to determine whether the quantity proof on heroin was sufficient (Count I), but allowed the life sentence conviction and special assessment on that count of the indictment to stand. (Pet. App. 5a.) In the usual case, this poses no problem because the indictment is silent on drug quantity; but where the Government chose to charge drug quantity as it did here, the

heroin count conviction and the special assessment cannot stand when there was no proof of heroin amounts to satisfy the indictment.

I. THE CONSTITUTIONALITY OF 21 U.S.C. § 841 IS AN IMPORTANT QUESTION TO RESOLVE IN LIGHT OF THE DOUBTS RAISED IN *APPRENDI v. NEW JERSEY.*

Petitioner's constitutional concern was unambiguously expressed by Justice Breyer in his *Apprendi* dissent: there is "serious uncertainty about the constitutionality of the confinement of those punished under [statutes such as section 841]." *Apprendi*, 530 U.S. at 565 (Breyer, J., dissenting). Justice O'Connor's dissenting opinion in *Apprendi* characterized the majority's decision as one that "will surely be remembered as a watershed change in constitutional law . . . ." *Apprendi*, 530 U.S. at 524 (O'Connor, J., dissenting).

The majority in *Apprendi* did not directly address this issue, but it is an important issue directly affecting how drug cases are charged and prosecuted nationwide. This issue is being raised in numerous drug cases. A review of this Court's docket shows that numerous cases have already been vacated and remanded to reconsider in light of *Apprendi*. This Court should squarely address the issue to avoid confusion and clarify the application of *Apprendi* and § 841 in future drug prosecutions.

Even before *Apprendi*, the Seventh Circuit expressed concerns about the constitutionality of § 841 if, as *Apprendi* ultimately held, the facts in U.S.C. § 841(b) were anything other than sentencing factors. The Seventh Circuit stated:

> The avoidance of the constitutional issue by statutory construction is not available in the case of section 841, because the division between the elements of the crime and factors relating to how severely to punish offenders is much clearer than in the statute interpreted in *Jones*. Subsection (a), captioned "Unlawful acts," defines the offense of distributing, etc. a controlled (or counterfeit controlled) substance, while subsection (b), captioned "Penalties" specifies how the "person who violates subsection (a). . . shall be sentenced" - - namely more severely depending on the type and quantity of the drug.

United States v. Jackson, 207 F.3d 910, 920 (7th Cir. 2000), *cert. granted in part*, judgment vacated and remanded, *Jackson v. United States*, 121 S. Ct. 376 (2000), overruled *in part*, *United States v. Nance*, 236 F.3d 820 (7th Cir. 2000).

After *Apprendi*, the Seventh Circuit did not return to this constitutional concern, but answered the constitutional issue by substituting its judgment for what Congress intended, and making the observation, "[h]ow statutes are drafted, or implemented, to fulfill that [burden of proof] requirement is a subject to which the Constitution does not speak." (Pet. App. 3a.) There is no doubt that Congress intended otherwise. *E.g. United States v. Nordby*, 225 F.3d 1053, 1058 (9th Cir. 2000) ("Congress, therefore, intended that drug quantity be a sentencing factor.")

The Seventh Circuit analysis conflicts with this Court's line of cases starting with *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and proceeding through *Apprendi*. In *Monge v. Calfornia*, 524 U.S. 721 (1998), Justice Scalia,

wrote the dissenting opinion of four Justices and his finger on the constitutional infirmity of Congress drafting criminal statutes like it did in § 841:

> Suppose that a State repealed all of the violent crimes in its criminal code and replaced them with only one offense, 'knowingly causing injury to another,' bearing a penalty of 30 days in prison, but subject to a series 'sentencing enhancements' authorizing additional punishment up to life imprisonment or death on the basis of various levels of *mens rea*, severity of injury, and other surrounding circumstances. Could the state then grant the defendant a jury trial, with requirement of proof beyond a reasonable doubt, solely on the question whether he 'knowingly cause[d] injury to another,' but leave it for the judge to determine by a preponderance of the evidence whether the defendant acted intentionally or accidentally, whether he used a deadly weapon, died from the injury the defendant inflicted? If the protections extended to criminal defendants by the Bill of Rights can be so easily circumvented, most of them would be, to borrow a phrase from Justice Field, 'vain and idle enactment[s], which accomplish nothing, and most unnecessarily excited Congress and the people on [their] passage.'

Id. at 738-39. This same constitutional concern was echoed in the context of Section 841 by Judge Posner in *United States v. Jackson*, 207 F.3d 910, 920 (7th Cir. 1996.) (Congress should not be permitted to "skirt the requirement

of proof beyond a reasonable doubt . . . by redefining elements of a crime as sentencing factors.")

In *Apprendi*, this Court returned to this issue and examined the constitutional issue based on how the legislature structures the statute. *Apprendi* could not have been clearer on the issue:

> It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.

Apprendi v. New Jersey, 530 U.S. at 490 (quoting *Jones v. United States*, 526 U.S. at 252-253 (opinion of Stevens, J.)); *see also Specht v. Patterson*, 386 U.S. 605 (1967).

This conclusion followed from the decision in *Jones v. United States*, 526 U.S. 227 (1999). How Congress chose to draft the carjacking statute was critical to the analysis in *Jones*. Like the carjacking statute in *Jones*, Congress was equally clear when drafting § 841 to bifurcate the "penalties" provision such that they were not to be proven beyond a reasonable doubt. Subsection (a) sets forth "[u]nlawful acts" that require that the proscribed conduct with controlled substances be done "knowingly or intentionally." 21 U.S.C. § 841(a). As charged in this case, the proscribed conduct is knowingly or intentionally possessing a controlled substance with the intent to distribute. Subsection (b) of the statute is captioned "Penalties" and sets forth various maximum and minimum penalties based on the existence of a variety of factors, including the type and quantity of drug involved. *See* 21 U.S.C. § 841(b).

Prior to *Apprendi*, court of appeals were uniform in adopting the position that § 841(b) involved sentencing

factors.[1] During this time, Congress amended § 841 in 1988, 1990, 1994, 1996, and 1998. Although modifying the statute on numerous occasions, Congress never attempted to alter the unanimous view of the courts that § 841(b) only set forth sentencing factors.

The Seventh Circuit recognized the significance of the plain language in § 841 by stating that prior to *Apprendi* the court "took Congress at its caption and held that only the elements specified in Sec. 841(a) need be proved beyond a reasonable doubt." (Pet. App. 2a.) Prior to *Apprendi*, the Seventh Circuit had concluded that language in § 841 is unambiguous. *United States v. Jackson*, 207 F.3d at 920. With an unambiguous statute that improperly lowers the burden of proof, the proper course is to strike down the statute as violating due process. This was the remedy in *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

Rather than adhere to its pre-*Apprendi* conclusion in *Jackson*, the Seventh Circuit elected to construe § 841 to mean that facts in § 841(b) - - the "penalty" portion of the statute - - are actually elements of the § 841(a) crime that must be added to an indictment and proven beyond a reasonable doubt. While expedient, there can be no reasonable doubt that Congress did not intend this construction of the statute. The plain language of the statute says otherwise; and at no time during the many amendments

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[1] *See, e.g., United States v. Jackson*, 207 F.3d 910 (7th Cir. 2000); *United States v. Lindia*, 82 F.3d 1154, 1160-61 (1st Cir. 1996); *United States v. Campuzano*, 905 F.2d 677, 679 (2d Cir. 1990); *United States v. Parker*, 30 F.3d 542, 554 (4th Cir. 1994); *United States v. Morgan*, 835 F.2d 79, 81 (5th Cir. 1987); *United States v. Levy*, 904 F.2d 1026, 1033-34 (6th Cir. 1990); *United States v. Silvers*, 84 F.3d 1317, 1320-21 (10th Cir. 1996); *United States v. Williams*, 876 F.2d 1521, 1524-25 (11th Cir. 1989); *United States v. Lam Kwong-Wah*, 966 F.2d 682, 685-86 (D.C. Cir. 1992).

to § 841 did Congress express any concern that the courts were authorizing the lower burden of proof to impose drug sentences.

The effect of the Seventh Circuit decision was to redraft and apply § 841 in a manner not supported by the statutory language and in a manner that Congress did not intend. This is the procedure condemned by this Court in *United States v. Evans*, 333 U.S. 483 (1948). *Evans* involved a statute that prohibited smuggling and harboring aliens and provided that violators of the law "shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $2,000 and by imprisonment for a term not exceeding five years for each and every alien so landed or brought in or attempted to be landed or brought in." *Id.* at 484. The plain language of the statute assigned maximum penalties for aliens smuggled into the United States but did not assign maximum penalties for aliens harbored in the United States. The defendant was charged with harboring, not smuggling, and the district court granted his motion to dismiss the indictment because the statute did not provide maximum penalties for his offense. *Id.* This Court unanimously affirmed.

This Court recognized that it was overwhelmingly clear that Congress intended to criminalize the conduct at issue. *Id.* at 485. Nevertheless, this Court rejected the government's request "to make [the statute] effective by applying that one of the possibilities which seems most nearly to accord with the criminal proscription and the terms of the penalizing provision." *Id.* This Court refused to "plug the hole in the statute[,]" *Id.* at 487, concluding that "[t]his is a task outside the bounds of judicial interpretation. It is better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would

make. That task it can do with precision. We could do no more than make speculation law." *Id.* at 495.

If this Court would not rewrite the relatively simple statute in *Evans*, this Court should squarely address whether § 841(b) is any different and conclude it is not. As demonstrated by § 841(b), the sentencing considerations in drug cases are extremely complicated and are best left for Congress. 21 U.S.C. § 841 must be declared unconstitutional and, as in *Evans*, Mr. Brough's conviction should be reversed.

This exceptionally important issue merits consideration.

II. *APPRENDI v. NEW JERSEY* RAISES SERIOUS QUESTIONS ABOUT PROPER PROCEDURE AND THE QUANTUM OF PROOFS IN DRUG CASES.

A. The Court Of Appeals Should Not Have Resolved *Apprendi* Error By Substituting Its Judgment For The District Court To Find An Element Of The Offense.

In *Sullivan v. Louisiana*, 508 U.S. 275 (1993) this Court reversed a conviction observing that "[t]he Sixth Amendment requires more than appellate speculation about a hypothetical jury's action. . . ." *Id.* at 280. The Seventh Circuit overlooked that rule when deciding that it could resolve *Apprendi* error by determining on appeal that drug quantity -- an element charged in the indictment, but not proven at trial -- could have been proven at trial beyond a reasonable doubt.

Because Mr. Brough raised *Apprendi* on direct appeal, he was entitled to the full benefit of that constitutional rule. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). Since the Government chose to charge drug amount in the indictment, Mr. Brough was entitled to a trial where the Government must prove drug quantity beyond a reasonable doubt. This conclusion is firmly grounded in the basic principle that all facts necessary to constitute a statutory offense must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970).

The Seventh Circuit instead impermissibly speculated on appeal what the evidence *would* have shown at trial had the Government attempted to do something it never attempted to do at trial or sentencing -- to prove drug quantity beyond a reasonable doubt. This procedure is not only constitutionally defective for the reasons set out in *Sullivan v. Louisiana*, *supra*, but it is contrary to well-established principles that appellate courts should not evaluate and determine credibility.

The impact of the Seventh Circuit procedure extends beyond the conviction to the length of sentence. If no quantity is proven beyond a reasonable doubt, the maximum sentence is 20 years. 21 U.S.C. § 841(b)(1)(C). In cases of over 100 grams or more of heroin or over 5 grams of cocaine base, the statutory maximum sentence is increased to 40 years. 21 U.S.C. § 841(b)(1)(B). In cases of over 1 kilogram of heroin or 50 grams of cocaine base, the statutory maximum sentence increases to life. 21 U.S.C. § 841(b)(1)(A).

The due process requirement extends to facts going to length of sentence. This Court made this clear in *Apprendi* stating: "[s]ince *Winship*, we have made clear beyond peradventure that *Winship's* due process and

associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'" *Apprendi*, 530 U.S. at 484 (quoting *Almendarez-Torres*, 523 U.S. at 251) (Scalia, J., dissenting)).

The application of this due process requirement in the context of length of sentence was squarely addressed in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), where this Court rejected a statutory scheme that placed the burden on a defendant to prove facts to win a reduction in offense. The emerging principle from *Mullaney* was emphasized in *Apprendi*:

> criminal law "is concerned not only with guilt or innocence in the abstract, but also with the degree of criminal culpability" assessed.

Apprendi, 530 U.S. at 485 (quoting *Mullaney v. Wilbur*, 421 U.S. at 697-98).

The only reason Mr. Brough is serving a life sentence is due to the impermissible fact finding on appeal. The Writ should be granted, or the case remanded to the trial court, to remedy this error.

B. The Error In The Seventh Circuit Procedure Was Magnified By Relying On Inherently Unreliable Witnesses To Transform Evidence By A Preponderance Into Evidence Beyond A Reasonable Doubt.

It is well established that a criminal defendant "has a due process right to be sentenced on the basis of reliable information." *United States v. Campbell*, 985 F.2d 341, 348 (7th Cir. 1993). Even prior to *Apprendi* in the

preponderance scheme, the Seventh Circuit expressed concerns about the quality of evidence being used to establish drug quantity for sentencing purposes.

In a dissenting opinion from a denial of an en banc hearing in *United States v. Rodriguez*, 73 F.3d 161 (7th Cir. 1996), Judge Posner, joined by Judge Diane Wood, observed that the dubious quality of evidence in drug cases coupled with the magnitude of the potential error demands close attention:

> because evidence of quantity of drugs sold is ordinarily given by criminals, the defendants' former associates, the risk of error cannot be reckoned trivial; and the magnitude of the potential error is enormous in a case in which quantity will determine whether the defendant gets a light sentence (even four and a half years is light by contemporary federal standards) or the heaviest possible short of death.

Id. at 163. Courts have gone so far as to vacate sentences as flunking the more modest preponderance of the evidence standard when the government's quantity evidence comes from estimates by drug addicts and criminals and is flawed with unexplained inconsistencies. *United States v. Beler*, 20 F.3d 1428 (7th Cir. 1994).

This issue is doubly important now that *Apprendi* requires proof of quantity beyond a reasonable doubt. *Cf. United States v. Rodriguez*, 73 F.3d at 163 (noting the "large" difference between preponderance and beyond a reasonable doubt when it comes to quantity estimates). The Government tried to avoid the credibility problem by changing its argument on the eve of the appellate argument

to claim that only 5 grams of crack need be found to authorize a life sentence. (Pet. App. 6a.) The Seventh Circuit did not permit that change of position, but circumvented the issue by finding 50 grams of crack could have been proven "beyond a reasonable doubt" with the rhetorical observation, "[I]f 37 grams was in stock on a single day, is it conceivable that, during the remaining 1,460 days of the conspiracy, Brough and his confederates handled no more than 12 grams of crack in total?" (Pet. App. 5a.)

The Seventh Circuit procedure assumed credibility not found below and improperly re-weighed the evidence to disregard testimony at trial that demonstrated that Petitioner was not linked to the 37 grams of crack seized at the drug house. No drugs were seized on Petitioner. (PSR p. 13, ¶ 47.) The drug house where the seizures took place was gang-related (Tr. 480:5 – 481:16), yet the Government had no evidence that Petitioner was associated in a gang. (PSR at p. 20.) Petitioner's fingerprints were not found on the drugs or packaging material, and packaging materials were found even though the government theory was that the drugs associated with Petitioner were pre-packaged. (Tr. 729:17 – 730:2.)

At trial, the Government did not attempt to prove any quantity of drugs beyond a reasonable doubt. At sentencing the Government repeatedly retreated to the use of "estimates," "extrapolation," "averages," and picking "middle grounds" to satisfy the preponderance standard and justify the quantities it attributed to Mr. Brough. (Sent. Tr., pp. 42:14-17; 45:5-14; 49:24-50:3; 57:4-8; 92:15-19.)

The government's *post hoc* rough estimates and approximations for sentencing purposes are no substitute for proof beyond a reasonable doubt. By definition, estimates assume uncertainty. When they are used to banish a person

to life in prison, they undermine the important values protected by the higher standard of proof. These values were emphasized by this Court in *In re Winship*:

> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. As we said in *Speiser v. Randall*, supra, at 525-526, 2 L Ed 2d at 1472, 1473: "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value - - as a criminal defendant his liberty - - this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt." To this end, the reasonable doubt standard is indispensable, for it "impresses on the trier of the fact the necessity of reaching a subjective state of certitude on the facts in issue." Dorsen &

Rezneck, In re Gault and the Future of Juvenile Law, 1 Family Law Quarterly, No. 4, pp. 1, 26 (1967).

In re Winship, 397 U.S. at 363-64; *see also United States ex rel Stachulak v. Coughlin*, 520 F.2d 931, 935 (7th Cir. 1975) (*Winship* standard grounded on "possibility of a loss of liberty and the certainty of stigmatization as a violator of the criminal law").

The use of estimates and approximations based on unreliable and speculative testimony from drug addicts and criminals falls far short of the "subjective state of certitude on the facts" that is essential to satisfy the *Winship* concerns. This is particularly important to moderate the harsh effects of the sentencing guidelines. *Cf. United States v. Sepulveda*, 15 F.3d 1161, 1198 (lst Cir. 1993) (noting in a pre-*Apprendi* case that "courts must sedulously enforce that quantum-of-proof rule, for, under the guidelines, drug quantity has a dramatic leveraging effect").

The Writ should be granted to address the constitutional requirements of proof of drug quantity in the post-*Apprendi* regime.

III. THE SEVENTH CIRCUIT IMPROPERLY SHIFTED THE BURDEN TO MR. BROUGH BY APPLYING THE PLAIN ERROR STANDARD.

The standard of review on *Apprendi* error has generated appellate discussion. E.g. *United States v. Candelario*, 240 F.3d 1300 (11th Cir. 2000) (discussing application of harmless error and plain error). The Seventh Circuit erroneously applied plain error and thereby deprived Petitioner the benefit of the *Apprendi* rule. (Pet App. 5a.)

Petitioner's Rule 29(a) motion at the close of evidence preserved his objection and required that the harmless error standard be applied. The Seventh Circuit erroneously assumed that Mr. Brough lost the benefit of the harmless error standard because *Apprendi* had not been handed down at the time of his Rule 29(a) motion. That burden shifting analysis is wrong, and eviscerates Petitioner's rights to the benefit of a retroactive rule as established in *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

The difference between plain error and harmless error matters. Harmless error places the burden on the Government to prove the evidence was sufficient beyond a reasonable doubt. In contrast, plain error shifts the burden to the defendant and is only reserved for circumstances where trial counsel has made an error. The burden shifting is justified only on the basis that providing a second chance after such a mistake would be contrary to the adversary system and interfere with the efficient operation of the criminal justice system. *United States v. Douglas*, 818 F.2d 1317, 1320 (7th Cir. 1987) (quoting *United States v. Silverstein*, 732 F.2d 1338, 1349 (7th Cir. 1984)).

The Seventh Circuit should not have shifted the burden to Petitioner, who timely made a Fed. R. Civ. P. 29(a) acquittal motion. (Tr. 1182:305.) The Seventh Circuit compounded this error because the Government chose to charge Petitioner with drug quantities in the indictment and was then under an obligation to prove these quantities at trial beyond a reasonable doubt. (Pet. App. 22a – 23a.) Mr. Brough's Rule 29(a) motion preserved ***all*** challenges to the sufficiency of the evidence:

> The motion for acquittal takes the place of a motion for directed verdict. Rule 29, Federal Rules of Criminal Procedure, supra, and see

> Notes of Advisory Committee on Rules, Subd. (a) 1. The motion for a directed verdict raises the question as to the sufficiency of the evidence to support the verdict of a jury or finding of the court. . . .
>
> We think the motion for acquittal made at the conclusion of all the evidence properly raised the question of venue in the court below. It is a challenge to the Government in the presence of the court that the Government has failed in its proof. The motion is not required by the rules to be in writing or to specify the grounds therefor. That in itself would indicate that the defendant is not required to go over the proof for the benefit of the Government or the court, in the absence of some request for more specific objection.

United States v. Jones, 174 F.2d 746, 748 (7th Cir. 1949.)

Since there was no error that justifies a shifting of the burden, it subverts the purpose of the plain error doctrine and violates Mr. Brough's due process rights to shift the burden of proof to him when the rule that governs the appeal from *Apprendi* is a constitutional rule designed to protect his constitutional rights.

IV. THE SEVENTH CIRCUIT LET STAND A CONVICTION FOR THE HEROIN COUNT THAT HAS NEVER BEEN PROVEN BEYOND A REASONABLE DOUBT.

Although the Seventh Circuit undertook to remedy the *Apprendi* error by re-evaluating the trial evidence on

appeal as to crack cocaine (Count II) using a new standard, the same analysis was abandoned as to the heroin count (Count I) on the premise that it does not affect the "sentencing package." (Pet. App. 5a.)

That analysis might be correct in the usual case where the Government does not charge drug amounts in the indictment. Here specific drug amounts were charged. (Pet. App. 22a – 23a.) There was no finding of heroin amount beyond a reasonable doubt at trial, none at sentencing and the Seventh Circuit expressly declined to make that finding on appeal. In short, the indictment on the heroin count has never been proven.

Because the indictment charged specific drug quantities, the Seventh Circuit improperly applied the concurrent sentence doctrine. *Ray v. United States*, 481 U.S. 736 (1987). While the Seventh Circuit stated it affirmed the convictions (Pet. App. 5a – 6a), it overlooked that the indictment charged drug quantity on the heroin count. (Count I.) Since the Seventh Circuit said it was "unnecessary to decide whether the evidence of heroin quantity is equally compelling" (Pet. App. 5a), there no finding sufficient to affirm the offense charged in Count I of the indictment. The Petitioner remains liable for the special assessment on that unproven heroin count.

The heroin conviction must be reversed and the $100 special assessment refunded.

CONCLUSION

Based on the foregoing, Petitioner, Jerome Brough, respectfully request that this Honorable Court vacate the Seventh Circuit judgment and remand. In the alternative,

Petitioner requests that the petition for a writ of certiorari be granted.

Dated this 17th day of July, 2001.

Respectfully submitted,

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APPENDICES

APPENDIX A

In the
United States Court of Appeals
for the Seventh Circuit

No. 00-2695

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JEROME BROUGH,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 98-CR-222—**C.N. Clevert**, *Judge.*

ARGUED MARCH 2, 2001—DECIDED MARCH 22, 2001

Before CUDAHY, EASTERBROOK, and ROVNER, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* After a bench trial, Jerome Brough was convicted of conspiring to distribute both heroin and crack cocaine, and he was sentenced to life imprisonment. His main appellate arguments arise from *Apprendi v. New Jersey,* 530 U.S. 466, 120 S. Ct. 2348 (2000)—oddly, because *Apprendi* principally concerns the division of responsibility between judge and jury, while Brough agreed that all issues in his case would be resolved by a judge. But *Apprendi* affects the burden of persuasion as well as the identity of the decisionmaker, so it has potential bearing even when the defendant has waived his entitlement to decision by a jury.

Brough's lead argument is that 21 U.S.C. §841 is unconstitutional (and that all conspiracy convictions under 21 U.S.C. §846 fail derivatively) because §841 does not mention the burden of persuasion (or the allocation of issues between judge and jury) and does not identify sentencing considerations as elements of the offense. Section 841(a), captioned "Unlawful acts", provides:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Then §841(b), captioned "Penalties", says that "any person who violates subsection (a) of this section shall be sentenced as follows" and lays out the minimum and maximum penalties for various types and quantities of drugs, with adjustments depending on whether the defendant has prior drug-related convictions and whether the activities caused death or serious injury. Until *Apprendi* we took Congress at its caption and held that only the elements specified in §841(a) need be proved beyond a reasonable doubt to the jury's satisfaction; the penalty provisions in §841(b) were to be administered by the sentencing judge under the preponderance standard. See *United States v. Edwards,* 105 F.3d 1179 (7th Cir. 1979), affirmed, 523 U.S. 511 (1998); *United States v. Jackson,* 207 F.3d 910 (7th Cir. 2000), remanded, 121 S. Ct. 376 (2000), decision on remand, 236 F.3d 886 (7th Cir. 2001). But *United States v. Nance,* 236 F.3d 820 (7th Cir. 2000), holds that *Apprendi* requires a different approach, and that all facts (other than prior convictions) that set the maximum possible punishment under §841(b) must be established beyond a reasonable doubt to the satisfaction of the same body that determines culpability under §841(a). See also, e.g. *United States v. Patterson,* No. 97-3159 (7th Cir. Mar. 2, 2001); *United States*

v. Westmoreland, No. 99-1491 (7th Cir. Feb. 15, 2001), and the opinion on remand in *Jackson.* These constitutional requirements are external to §841. It follows, Brough believes, that §841 is unconstitutional and cannot support *any* criminal punishment, for courts are not supposed to rewrite criminal statutes and §841 cannot be severed to produce a constitutional rule.

Brough's argument is confused. *Apprendi* and *Nance* do not establish that anything in §841 is unconstitutional or require its severance. If Congress had specified that only judges may make the findings required by §841(b), or that these findings must be made by a preponderance of the evidence, then §841 would create a constitutional problem. But the statute does not say who makes the findings or which party bears what burden of persuasion. Instead the law attaches effects to facts, leaving it to the judiciary to sort out who determines the facts, under what burden. It makes no constitutional difference whether a single subsection covers both elements and penalties, whether these are divided across multiple subsections (as §841 does), or even whether they are scattered across multiple statutes (see 18 U.S.C. §§ 924(a), 1963). *Apprendi* holds that the due process clauses of the fifth and fourteenth amendments make the jury the right decisionmaker (unless the defendant elects a bench trial), and the reasonable-doubt standard the proper burden, when a fact raises the maximum lawful punishment. How statutes are drafted, or implemented, to fulfil that requirement is a subject to which the Constitution does not speak.

Once the maximum penalty has been established in a constitutional manner, the judge selects a punishment using the preponderance standard. See *Edwards,* 523 U.S. at 514-15. Thus we concluded in *Talbott v. Indiana,* 226 F.3d 866 (7th Cir. 2000), that if (for example) the indictment specifies that the drug was cocaine or heroin, then any penalty up to 20 years is lawful even if the jury does not find a particular quantity, because 20 years is the maximum under §841(b)(1)(C) for unlawfully distributing any detectable quantity of any Schedule I or II controlled substance. See

also, e.g., *Westmoreland,* slip op. 27-28. *Edwards* and *Talbott* demonstrate, and we now hold, that there is no constitutional defect in the design of §84 1, and that there is no impediment to convictions under the statute as written. Accord, *United States v. Candelario,* 2001 U.S. App. LEXIS 1524 (11th Cir. Feb. 5, 2001), at *28 n.16. *Apprendi* strongly affects how §841 is implemented; as we concluded in *Nance* and *Westmoreland,* a *post-Apprendi* indictment should specify, and the trier of fact must be instructed to determine, not only the elements of the *offense,* which appear in §841(a), but also the events listed in §841(b) on which the prosecutor relies to establish the maximum sentence. But even if the trier of fact does not find any particular drug or quantity, a convicted defendant still faces some penalty—if only the one year for distributing the least serious of the drugs on Schedule V. 21 U.S.C. §841(b)(3). See *United States v. Norby,* 225 F.3d 1053, 1058 (9th Cir. 2000). Brough cannot take advantage of that low maximum, however, because the indictment charged him with distributing not only more than 50 grams of crack cocaine but also more than one kilogram of heroin, each enough to authorize life in prison if proved beyond a reasonable doubt. 21 U.S.C. §841(b)(1)(A)(i), (iii).

The evidence was quite sufficient to show guilt beyond a reasonable doubt; we reject Brough's attack on the district judge's finding of culpability. But the judge, acting before *Apprendi,* found the kinds and quantities of drugs involved by a preponderance of the evidence rather than beyond a reasonable doubt. Brough did not ask the judge to do otherwise, so we must decide whether the court's conclusion is plain error. See *Nance, Westmoreland, Patterson,* and the opinion on remand in *Jackson.* Brough's argument has some appeal, because when imposing sentence the judge expressed skepticism about the veracity of the witnesses whose testimony he credited; maybe the judge would find the drug-quantity evidence sufficient at the preponderance standard but not enough to suppress a reasonable doubt. Yet the same judge convicted Brough, on the testimony of these same witnesses, and concluded on the basis of evidence received at

the sentencing hearing that Brough conspired to distribute at least 2,000 grams of crack cocaine, 40 times the amount that Congress deemed sufficient to support life imprisonment. Would a judge who thought that a preponderance of the evidence demonstrates distribution of 2,000 grams have thought that a much smaller quantity had not been established beyond a reasonable doubt? That is very unlikely, and for a simple reason. Agents seized 37 grams of crack at the end of this conspiracy, which lasted for four years. If 37 grams was in stock on a single day, is it conceivable that, during the remaining 1,460 days of the conspiracy, Brough and his confederates handled no more than 12 grams of crack in total? No, it is not conceivable. A judge willing to credit the evidence of the 37-gram seizure, and to find guilt beyond a reasonable doubt, would have been bound to determine beyond a reasonable doubt that the conspirators distributed at least an additional 13 grams of crack during the conspiracy's lifetime. That is enough to establish that a penalty under §841(b)(1)(A) is not plain error.

As for heroin: Because Brough's conviction for distributing cocaine is itself enough to authorize a sentence of life imprisonment, it is unnecessary to decide whether the evidence of heroin quantity is equally compelling. Even if the sentence for distributing heroin were cut down to the 20-year maximum authorized for a smidgen of that drug, see 21 U.S.C. §84 1(b)(1)(C), Brough's aggregate sentence would be unaffected, for the Sentencing Guidelines instruct the district judge to use the maximum available for the most serious count (and consecutive sentences if necessary) to achieve the total punishment appropriate to the convictions and all relevant conduct. U.S.S.G. §5G1.2. The concurrent sentence doctrine makes it unnecessary to consider the maximum term that could have been imposed for a conviction that does not augment the total punishment. Although the $100 special assessment means that a court must consider every challenge to the propriety of a conviction, see *Ray v. United States,* 481 U.S. 736 (1987), we have done this by holding that Brough's convictions are

valid. There is no need to go further and consider matters that do not affect the total sentencing package.

This conclusion also makes it unnecessary to rely on a possibility raised by the prosecutor at oral argument: that even 5 grams of crack suffice, because Brough has a prior conviction for a drug felony. In the district court the prosecutor gave notice of this conviction under 21 U.S.C. §851, and *Apprendi* does not overrule the holding of *Almendarez-Torres v. United States,* 523 U.S. 224 (1998), that penalty enhancements based on recidivism need not be established beyond a reasonable doubt. See 120 S. Ct. at 2362. The drugs seized, coupled with the conviction, expose Brough to life in prison. Bafflingly, the United States did not mention this in its brief on appeal, and Brough says that a recidivism enhancement therefore has been forfeited. Maybe so, but a defendant who forfeited his own contentions and must urge plain error is not in the best position to complain about the prosecutor's oversight. Brough's prior conviction reinforces our conclusion that no miscarriage of justice has occurred. Had *Apprendi* been decided before the district court imposed sentence, the effect of his prior conviction would have held center stage. A remand could not lead to a lower sentence.

AFFIRMED

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals
for the Seventh Circuit

APPENDIX B

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 19, 2001

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. ILANA DIAMOND ROVNER, Circuit Judge

UNITED STATES OF AMERICA,	Appeal from the United States District Court
Plaintiff-Appellee,	For the Eastern District of
No. 00-2695 v.	Wisconsin
JEROME BROUGH,	No. 98-CR-222
Defendant-Appellant	C.N. Clevert, Judge

Order

Defendant-appellant filed a petition for rehearing and petition for rehearing en banc on April 5, 2001. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,)		CASE NO.
Plaintiff,	)	98-CR-222
v.	)	
JEROME BROUGH,	)	
Defendant.	)	VOLUME 7

HONORABLE CHARLES N. CLEVERT
PRESIDING DISTRICT COURT JUDGE

MILWAUKEE, WISCONSIN FEBRUARY 4, 2000

COURT'S DECISION IN THE BENCH TRIAL
HELD IN THE ABOVE-ENTITLED MATTER

APPEARANCES:
DANIEL H. SANDERS and ELIZABETH BLACKWOOD, U.S. Attorney's Office, 517 E. Wisconsin Ave., Milwaukee, WI 53202, appearing for the Plaintiff.

PATRICK C. BRENNAN, Brennan, Ramirez, Wilmouth & Sesini, 324 E. Wisconsin Ave., Milwaukee, WI 53202, appearing for the Defendant.

CYNTHIA M. BOHMAN, RMR
Official United States Court Reporter
517 E. Wisconsin Avenue, Room 226
Milwaukee, WI 53202
414-297-3596

1 PROCEEDINGS

(Morning proceedings commenced at 10:11a.m.)

THE CLERK: Case number 98-CR-222, United States of America v. Jerome Brough. This matter is before the Court for an oral decision. May we have the appearances, please.

MR. SANDERS: Daniel H. Sanders and Elizabeth Blackwood, Assistant United States Attorneys, for the government. Seated to our left is Agent Carol Starr of the Milwaukee Police Department assigned to the Drug Enforcement Administration here representing the government as the case agent.

THE COURT: Good morning, everyone.

AGENT STARR: Good morning.

MR. BRENNAN: Mr. Brough appears in his own person and with his attorney, Patrick Brennan. Good morning, Your Honor.

THE COURT: Good morning again, Mr. Brennan. And good morning, Mr. Brough.

THE DEFENDANT: Good morning, Judge.

THE COURT: In this case the government is proceeding on a superseding indictment which charges as follows. That beginning on or about January 1,1995 and continuing until the present in the State and Eastern District of Wisconsin, Jerome Brough a/k/a Rico, Charles Carter a/k/a Shaboo and Sandra Jefferson, defendants herein, did knowingly conspire with each other and other persons both known and unknown to the grand jury -- I note here there are several typographical

errors but it proceeds -- to possess with the intent — and I insert-- to distribute and distribute in excess of one kilogram of heroin, a Schedule I controlled substance, in violation of Title 21 United States Code sections 846 and 841(a)(1).

Count 2. The grand jury charges that beginning on or about January 1, 1995 and continuing until the present in the State and Eastern District of Wisconsin, Jerome Brough a/k/a Rico, Charles Carter a/k/a Shaboo and Sandra Jefferson, defendants herein, did knowingly conspire with each other and other persons both known and unknown to the grand jury – it says possess with the intent and again it should say – to possess with the intent to distribute and distribute in excess of 50 grams of cocaine base commonly known as crack cocaine, a Schedule II controlled substance in violation of Title 21 United States Code sections 846 and 841a)(1).

To the extent that the indictment does contain typographical errors I believe that it can be and should be corrected to include references to, I should say the use of the word "to" with respect to possessing and distributing the alleged substances. Regardless those typographical errors are not of consequence in this matter. The Court did hear testimony in a protracted trial offered by the government from various witnesses including officers and individual citizens, some of whom are related to the defendant in various ways.

The Court did hear evidence regarding the composition of substances which were seized from various individuals and the Court does believe that the unassailed testimony of the chemists in this case establish, establish beyond a reasonable doubt that heroin was possessed by various witnesses and that cocaine base was possessed by various witnesses and parties in this case. And so the substances which have been referred to in the indictment have been established, have

been established to this Court's satisfaction by credible evidence beyond a reasonable doubt.

I note that some of the testimony dealt with whether or not there were diluents or adulterants in the various substances. I do not find that the issues raised with respect to the composition of the drugs was of consequence in this particular case for various reasons which I will try to touch on as I proceed.

I will tell you that I have not prepared written findings in this matter because of the press of other business, but I do believe that my remarks taken as a whole will demonstrate the conclusions I have reached based all of the evidence in this case.

I also hasten to add that at several points during the course of the trial there were objections to alleged co-conspirator statements. Because of the Court's view that those objectionable statements, those -- I shouldn't say objectionable statements -- those statements which were objected to as not in the course of the conspiracy are of little consequence. The Court does not believe that its findings will be affected at all by the admission of the these statements.

Let me go back to the beginning. Detective Carol Starr, the case agent here, testified among other things that she participated in the arrest of the defendant Jerome Brough on August 19, 1999 at 434 46 Avenue, Bellwood, Illinois. She testified that she provided the defendant with his constitutional rights and he agreed to be interviewed. During the course of the defendant's interview he said among other things that he had visited Milwaukee and had done so on a number of occasions.

He traveled by bus, train, rented cars and his wife's Chevy Lumina for the purpose of saving his own vehicles. He also indicated that he owned a store on Polaski, JB's Discounts. He also advised that he owned a store on North Avenue in Chicago, North Avenue Fashions. He also said that he visits Milwaukee for the purpose of buying items from a Jay, I believe it's Jang or Jang at the Milwaukee Mall who sells him jewelry and clothing just above cost for resale in his own stores.

Now, I find that significant for several reasons not the least of which is it establishes the fact that the defendant is associated with JB Discounts and North Avenue Fashions as well as the sale of jewelry. The sale of jewelry's of significance because it would also indicate, it also indicates to the Court the defendant's access to jewelry bags which are alleged to have been used here for the packaging of drugs.

The defendant also stated to Detective Starr that he has associations with many of the witnesses who testified in this case or who were testified about during the course of the case as being involved in drug trafficking in Milwaukee. Those individuals include Linkko Kearney, Ursula Hogan, Alexander Blakemore, Mo, individual known as Georgia and Peaches. The defendant also advised Detective Starr that he is related to Andrew Jefferson who lives in Milwaukee, Baldhead, Steven Jefferson, who was his store employee in Chicago.

At the time of the defendant's arrest he was carrying a bag from which Detective Starr retrieved certain business cards. They included business cards for North Avenue Fashions, JB Discounts. And they showed that J.P. Brough was or is the owner of the businesses. My notes indicate that there was no identification with regard to JB Communications, however. The cards show telephone numbers and those telephone

numbers as demonstrated, as shown on the cards were linked to telephones which were used in Milwaukee to communicate back and forth between the cities and various individuals.

Detective Starr identified Jerome Brough as an individual who is known as Rico. Other individuals were linked to the defendant by Detective Starr and they included Miss Culbreath. As I go through the testimony I note that Detective DeValkenaere during the course of his investigation did seize items at 1430 West Highland from the home of Ursula Hogan and that those items included among other things a California safe and drugs and weapons.

Detective DeValkenaere likewise seized items at Ursula Hogan's home on a later date after she had moved. That address was 4370 North 19th Place. Maybe I should say he seized drugs outside of her, he recovered drugs outside the home after Miss Hogan did point them out. It's clear from the testimony of Miss Hogan that she had a long standing relationship with the defendant and the defendant did among other things befriend her and did provide some aid and comfort to her and utilize that as a basis for getting her to become involved in holding money and drugs for him.

It's clear, too, that there were a number of -- let me stop for a moment. I don't want to get into a complete recitation of all of the testimony in this case because the long and short of it is the government presented overwhelming evidence of the defendant's guilt with regard to conspiring with others, which included Mr. Carter and Sandra Jefferson, with the intent to distribute and actually distributing heroin and cocaine base.

A conspiracy is essentially an agreement to commit an illegal act. In this particular instance there is without doubt

overwhelming evidence of agreements to distribute drugs. Mr. Brough based upon the evidence recruited and in some instances allowed others to recruit persons to sell and distribute heroin. He assisted in putting up bars on drug houses here in Milwaukee. He traveled here to Milwaukee for that purpose. He provided paraphernalia which would enable drugs to be concealed, in particular, California safes.

And I note that the California safes which were presented in evidence and were testified about were very similar in design. I note, too, that California safes were transported from Chicago to Milwaukee by train and I find that significant in part because Mr. Brough acknowledged traveling to Milwaukee by train. So he seems to have some general familiarity with that mode of travel and seems to like that mode of travel.

I note, too, that the car, the Lumina which was testified about by several of the witnesses who said that, who identified the vehicle as one which was utilized by Mr. Brough. And, of course, Mr. Brough acknowledged the Lumina belongs to his wife. And, indeed, that is something which provides corroboration for the witnesses' testimony. The real issue in this case was whether or not various witnesses had reason to lie. That's, that's really the crux of the case as far as this Court is concerned. And that is what I looked at after the trial.

I examined the physical evidence with my gloves. And I do thank you, the parties, for providing me with latex gloves. I looked at the folds. I measured the aluminum foil. I looked at the edges. I looked at the texture as best I could discern it from the packaging because I did not want to open the packaging. The color, and there was consistency over the various exhibits that I observed. That is not to say that there weren't different diluents used. But I don't believe that's of

consequence. Even though Stepfunn Pearson who some might characterize as a, quote, expert drug user, unquote, said that he could detect no difference in the Dog Pound heroin that he used.

It's clear that the packaging was generally consistent. And it's also apparent that things did change with regard to packaging and the need to secure packaging. There was testimony that some of the sellers were using heroin. And when that became apparent it would appear that the packaging became a little more secure. And when the level of trust was highest the packaging was not as secure. That in my mind explains some of the changes in packaging.

The fact that different things were used as cutting agents doesn't detract from the underlying fact that heroin was being packaged and sold in essentially the same type of aluminum foil wrapping.

I had looked at the various agreements that the government entered with witnesses who testified. And the fact that Miss Hogan essentially got a pass for, I should say a pass notwithstanding her involvement in this case. And I asked myself why would each individual lie. Then I asked, well, why would they tell the truth. Some of the things I considered included the relationships that the people had with Mr. Brough or at least the relationships they claimed and the kinds of consequences that would flow from telling either the truth or a lie.

In the case of Miss Hogan Mr. Brough did some nice things, some considerate things, some compassionate things. Kojo Kazmundie died and Mr. Brough came to Miss Hogan's aid. He made sure that she had a roof over her head. And she had good reason in her mind at least to, quote, repay, unquote, his kindness. Given what she said about that it's

understandable that she would feel obliged to do something to help him out and to see to it that she and her children had a roof over their heads.

On the other hand, Miss Hogan also has had legal problems of her own. And I believe that she was not altogether candid. The same is true with respect to several of the other witnesses. Mr. Kearney, for example. And it's because of the fact that one must look at an alleged co-conspirator's statements with a degree of distrust that there was a lot of additional evidence to corroborate what was said and to verify or in some cases double and triple verify the veracity of what they had to say.

Notwithstanding some of the minor areas of inconsistency and the temptation for them to tell less than 100 percent truth I'm satisfied that each of the government's witnesses testified truthfully with regard to the essential facts in this case, that they had a relationship with Mr. Brough, that Mr. Brough either personally delivered or caused someone else to deliver drugs to them, that they were paid for their efforts and that they were in business together, they were essentially his employees.

Now, with regard to Mr. Carter and Sandra Jefferson, the testimony indicates that Sandra Jefferson was essentially a courier who brought drugs from Chicago to Milwaukee on behalf of the defendant in this case. Mr. Carter, on the other hand, appeared to be a person who possessed the drugs as well as sold drugs. Mr. Carter's ties with the defendant were established through a number of means, not the least of which were the business cards that showed the defendant's address and by the records which show communications between numbers associated with the defendant.

In going through my notes I am drawn to the testimony of Jeffrey Kranz, a ten year Milwaukee police veteran, who stopped a vehicle at 27th and north, 27th Street north of Highland. That's the instance where he had contact with Alexander Blakemore and they retrieved baggies in which he found 30 mini Ziplocks, black in color, and aluminum foil folds inside the bags. That was in June of 1996, June 11, 1996. Also Kranz identified Exhibits Al, A2 and A3 as the items that were seized.

Actually these, the, not the actual items but the sheets showing what the items were and their descriptions. These items were wrapped like the items that were subsequently, I should say had tinfoil packets that were folded in a manner similar to those that were found later. There were pagers and pistols found. Again, the pagers which were found, I believe Mr. Blakemore had two pagers, verify that pagers were used in the sale of both the crack cocaine and the heroin.

Kenneth Smith of the Milwaukee Police Department assisted in the traffic stop and verified what detective, what Officer Kranz had to say. Oh, also testified, he also testified regarding the California safes that were found at Ursula Hogan's home. He mentioned, too, that guns were found in the northwest closet of the bedroom, the California safe was on the dresser in that same room. And then again this is key because it verifies the testimony, it basically confirms the testimony of Miss Hogan as to where things were found and kept in her home.

Thomas Halverson, again, reaffirmed what some of the other officers had said regarding the pagers that were found in connection with the arrest of Mr. Steven Jefferson. I believe he testified that Officer Smith had handed over a pager that was taken from Steven Jefferson. And he, too, attested to the chain of custody of Exhibits AS, AG and the handling of

several pagers and items which were recovered from Alexander Blakemore.

I've already mentioned the chemists but I note that one was Nancy Wong who is now a forensic chemist in Massachusetts and she previously was employed by the Wisconsin crime lab. She did tests on the items in Al through A3. Al and 2 contain heroin, as did A3. She did various examinations including a visual examination, a mass spectrometry, gas chromatography and other tests. She also testified with respect to Exhibit A10 which is a photocopy of R96-2184. She also testified regarding D48.

Again, she confirmed her results and testified that the items she tested contained heroin. I see here that with regard to item 10, Milwaukee policy item number seven, she testified that she found cocaine base. She indicated that the substance was initially off white in color and contained chunks. A8 showed cocaine base as well and she performed the same tests on that exhibit as she did on A7.

Detective Starr was recalled and she testified regarding Kajuana Culbreath being seated in the rear seat of a car during the course of arrest and on the 29th of June of 1997 at 1334 North 28th Street, Milwaukee. This occurred after the police department received information that there was a black make selling heroin out of a car and had a semi automatic pistol. The car was described as a station wagon, a Dodge Aires.

Delinkko Kearney was in the driver's seat and Andrew Jefferson was in the passenger's seat and Kajuana Culbreath was in the rear seat. The B exhibits were recovered and they contained foil fold packets and mini Ziplocks. Also recovered was cash. Jefferson has $423 and Kearney had

168. Each had two pagers. Again, verifying the fact that pagers were being utilized for drug sales.

I am not going to go through and make additional itemized findings at this time unless the parties have questions. Suffice it to say that I have asserted the credibility of the witnesses. I've examined the evidence. I believe that the uncontroverted evidence is that the substances seized were as alleged in the indictment. The credible evidence is that the defendant agreed with others to possess with intent to distribute and distributed the drugs as charged.

For those reasons the Court will find the defendant guilty with respect to Count 1 as well as Count 2 and will direct that a presentence report be prepared and that this matter be set over for the purpose of sentencing. Does the government wish to be heard?

MR. SANDERS: No, Your Honor.

THE COURT: Does the defense?

MR. BRENNAN: No.

THE COURT: Let's give us, put down dates and times. And the question, one of the questions obviously is whether or not we should have at least 35 days between the finalization of the presentence report and the sentencing hearing. Do the parties wish to be heard in that regard?

MR. BRENNAN: Judge, Mr. Brough has no objection to waiving that otherwise applicable 35 day time period. His intent and his desire is to expedite the sentencing process.

THE COURT: Very well. Mr. Brough, you've heard your attorney's statement regarding your desire to expedite the

sentencing process and therefore not insist that no less than 35 days pass between the finalization of the presentence report and sentencing and the sentencing hearing in this case. Can you confirm for the record whether you agree with your attorney's statement.

THE DEFENDANT: Yes, I do.

THE COURT: And do you understand that you're not required to waive any rights or to agree to that?

THE DEFENDANT: Yes. I understand.

THE COURT: And are you proceeding voluntarily in that regard?

THE DEFENDANT: Yes, I am.

THE COURT: Very well. Miss Wilson.

THE CLERK: The presentence report is due March 31st. Any objections, April 12th. And a sentencing date of April 20th at 9:30.

MR. BRENNAN: That's fine.

THE COURT: Were those dates satisfactory?

MR. SANDERS: Yes, Your Honor.

MR. BRENNAN: Yes, sir.

THE COURT: Very well. Unless there's something else, I want the record to be clear that the Court has returned the exhibits to the government and I do ask that you retain those

items. There was one exhibit, I believe A3 which I had with my pads legal pads and that was not returned initially.

MR. SANDERS: I received it this morning, Your Honor.

THE COURT: All right. Is there anything else with respect to the exhibits?

MR. SANDERS: The government will maintain them and in the government's custody, in particular be the Drug Enforcement Administration.

THE COURT: Mr. Brennan.

MR. BRENNAN: I have nothing further.

THE COURT: Very well. Court is in recess.

(Morning proceedings concluded at 10:54 a.m.)

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

I, Cynthia M. Bohman, RMR, Official Court Reporter for the United States District Court, Eastern District of Wisconsin, Milwaukee, Wisconsin, hereby certify that the foregoing is a true and accurate transcript of my stenographic notes taken in the foregoing proceedings.

_____
Official Court Reporter

Dated this ___ day of March, 2000.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 98-CR-222
[Title 21 U.S.C. §§
841(a)(l) & 846]

JEROME BROUGH, aka "Rico",
CHARLES CARTER, aka
"Shaboo", and SANDRA
JEFFERSON,

Defendants.

SUPERSEDING INDICTMENT

COUNT ONE

THE GRAND JURY CHARGES: That beginning on or about January 1, 1995, and continuing until present, in the State and Eastern District of Wisconsin,

JEROME BROUGH, aka "Rico",
CHARLES CARTER, aka "Shaboo", and
SANDRA JEFFERSON,

defendants herein, did knowingly conspire with each other and other persons, both known and unknown to the grand jury, possess with the intent distribute and distribute; in excess of one (1) kilogram of heroin, a Schedule I controlled substance.

In violation of Title 21, United States Code, Sections 846 & 841 (a)(1).

COUNT TWO

THE GRAND JURY CHARGES: That beginning on or about January 1, *1995,* and continuing until present, in the State and Eastern District of Wisconsin,

JEROME BROUGH, aka "Rico",
CLLIVRLES CARTER, aka "Shaboo", and
SANDRA JEFFERSON,

defendants herein, did knowingly conspire with each other and other persons, both known and unknown to the grand jury, possess with the intent distribute and distribute; in excess of *50* grams of cocaine base, commonly known as "crack" cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Sections 846 & 841(a)(l).

A TRUE BILL:

Dated: 10/26/99

_____
FOREPERSON

THOMAS P. SCHNEIDER
United States Attorney

APPENDIX E

AO 245B (Rev. 8/96) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After
November 1, 1987)

v.

Case Number: **98-CR-222**

JEROME BROUGH

Patrick C. Brennan
Defendant's Attorney
Daniel H Sanders
Assistant United States Attorney

After a bench trial, the court found the defendant guilty as to counts one and two of the two-count superceding indictment.

Count Number(s)1:

Title & Section	Nature of Offense	Date Offense Concluded
21 U.S.C. §§ 841(a)(1) and 846	Conspiracy to possess with intent to distribute and distribute heroin	5/20/98

Count Number(s) 2:

Title & Section	Nature of Offense	Date Offense Concluded
21 U.S.C. §§ 841(a)(1) and 846	Conspiracy to possess with intent to distribute and distribute cocaine base	5/20/98

The defendant is sentenced as provided in Pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 325-62-9245
Defendant's Date of Birth: 9/17/65
Defendant's USM No.: 10616-424
Defendant's Address: 434 46th Avenue, Bellwood, IL 60104

June 21, 2000
Date of Imposition of Judgment

Signature of Judicial Officer

C.N. Clervert, U.S. District Judge
Name & Title of Judicial Officer
6/22/00
Date

AO 245B (Rev. 8/96) Judgment in a Criminal Case: Sheet 2 - Imprisonment

Defendant: JEROME BROUGH
Case Number: 98-CR-222

IMPRISONMENT

The defendant is hereby Committed to the Custody of the United States Bureau of Prisons to be imprisoned for a term of **life as to count one and a term of life as to count two, to run concurrently for a total term of life.**

☒ The court makes the following recommendations to the Bureau of Prisons: Placement at ECI Pekin Participation in the Inmate Financial Responsibility Program

☒ The defendant is remanded to the custody of the United States Marshal.

☒ The defendant shall surrender to the United States Marshal for this district.

- ☐ by noon on
- ☐ as notified by the Probation or Pretrial Services Office.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,
- ☐ before 2 p.m. on
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By:_____

Deputy U.S. Marshal

AO 245B (Rev. 8/96) Judgment m a Criminal Case:
Sheet 3 - Supervised Release

Defendant: **JEROME BROUGH**
Case Number: **98-CR-222**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **five years as to count one, and a term of five years as to count two, to run concurrently for a total term of five years supervised release.**

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug within 1 5 days after his release from imprisonment and a minimum of two drug tests per each year of supervised release.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. ~ 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm the defendant's compliance with such notification requirement.

AO 245B (Rev 8/96) Judgment in a Criminal Case:
Sheet 3 - Additional conditions of Supervised Release

Defendant: **JEROME BROUGH**
Case Number: **98-CR-222**

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

1. The defendant is not to possess any firearms or other dangerous weapons.

2. Pursuant to the Violent Crime Control and Law Enforcement Act of 1 994, the defendant shall not illegally possess any controlled substance. Such possession will result in revocation of the supervision term and the defendant will serve a term in prison. The defendant shall submit to one drug test within 10 days of release from imprisonment and at least two tests per each year of supervised release as directed by his probation officer.

3. The defendant is to pay any balance of the fine at a rate of not less than $100.00 per month.

4. The defendant shall not open new lines of credit or use existing credit (which includes the leasing of any vehicle or other property), without prior approval from the probation officer.

5. The defendant is to provide the probation officer with access to all financial information, including but not limited to, all state and federal income tax returns. All tax returns shall be filed in a timely manner.

6. The defendant is to cooperate with Child Support Enforcement in payment of any child support or arrearages,

and to make regular payments at the direction of the probation officer.

AO 245B (Rev 8/96 Judgment in a Criminal Case:
Sheet 5 Part A - Criminal Monetary Penalties

Defendant: **JEROME BROUGH**
Case Number: **98-CR-222**

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

Totals:

Assessment	Fine	Restitution
$200.00	$ 2,000.00	None
	(Interest is Waived)	

AO 2458 (Rev 8/96) Judgment in a Criminal Case:
Sheet 5 Part B - Schedule of Payments

Defendant: **JEROME BROUGH**
Case Number: **98-CR-222**

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

A ☒ **The special assessment shall be paid in full immediately.**

B ☐ $_____ immediately, balance due (in accordance with C, D, or E);

or

C ☐ not later than; or

D ☐ in installments to commence days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☒ Any balance of the fine shall be paid at a rate of not less than $100.00 per month.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

☐ Joint and Several

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall immediately forfeit to the government....

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

AO 245B (Rev 8/96) Judgment in a Criminal Case:
Sheet 6 - Statement of Reasons

Defendant: **JEROME BROUGH**
Case Number: **98-CR-222**

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report as amended.

Guideline Range Determined by the Court:

Total Offense Level: 44
Criminal History Category: VI
Imprisonment Range: Life
Supervised Release Range: 5 years
Fine Range: $25,000.00 to $8,000,000.00

☒ Fine is below the the guideline range because of the defendant's inability to pay.

Total Amount of Restitution:

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

☐ For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do

not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

The sentence is within the guideline range, which exceeds 24 months, and the court finds not reason to depart from the sentence called for by the application of the guidelines.

APPENDIX F

SUBCHAPTER I—CONTROL AND ENFORCEMENT

PART D—OFFENSES AND PENALTIES

§ 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if

death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (1) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N--[1-(2-phenylethyl)-4-piperidinyll propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, or I gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in

accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a

felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of .a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V. such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable tinder this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such persons shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (l)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—

(A) creates a serious hazard to humans, wildlife, or domestic animals.

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 1 8, United States Code, or imprisoned not more than five years, or both.

(7) Penalties for distribution. (A) In general. Whoever, with intent to commit a crime of violence, as defined in section 16 of Title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with Title 18.

(B) Definitions. For purposes of this paragraph, the term "without that individual's knowledge's means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Repealed. Pub.L. 98-473, Title II, § 224(a)(2), formerly § 224(a)(6), Oct. 12, 1984, 98 Stat. 2030; renumbered § 224(a)(2), Pub.L. 99-570, Title I, § 1005(a)(2), Oct. 27, 1986, 100 Stat. 320766

(d) Offenses involving listed chemicals

Any person who knowingly or intentionally—

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that he listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(e) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any person commits such a violation after I or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years and shall be fined not more than $20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device

designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(f) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(g)Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under Title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under Title 18 or imprisoned not more than one year, or both.

(Pub.L. 91-513, Title II, § 401, Oct. 27. 1970, 84 Stat. 1260; Pub.L. 95-633, Title II, § 201, Nov. 10, 1978, 92 Stat. 3774; Pub.L. 96-359, § 8(c), Sept. 26, 1980, 94 Stat. 1194; Pub.L. 98-473, Title II, §§ 224(a), 502, 503(b)(1), (2), Oct. 12, 1984, 98 Stat. 2030, 2068, 2070; Pub.L. 99-570, Title I, §§ 1002, 1003(a), 1004(a), 1005(a), 1103, Title XV, § 15005, Oct. 27, 1986, 100 Stat. 3207-2, 320755, 3207-6, 3207-11, 3207-192; Pub.L. 100-690, Title VI, §§ 6055, 6254(h),

6452(a), 6470(g), (h), 6479, Nov. 18, 1988, 102 Stat. 4318, 4367, 4371, 4378, 4381; Pub.L. 101-647, Title X, § 1002(e), Title XII, § 1202, Title XXXV, § 3599K, Nov. 29, 1990, 104 Stat. 4828, 4830, 4932; Pub.L. 103-322, Title IX, § 90105(a), (c), Title XVIII, § 180201(b)(2)(A), Sept. 13, 1994, 108 Stat. 1987, 1988, 2047; Pub.L. 104-237, Title II, § 206(a), Title III, § 302(a). Oct. 3, 1996, 110 Stat. 3103, 3105; Pub.L. 104-305, § 2(a), (b)(1), Oct 13, 1996, 110 Stat. 3807; Pub.L. 105-277, Div. E, § 2(a), Oct. 21, 1998, 112 Star. 2681-759.)

Supreme Court, U.S.
FILED
AUG 20 2001

No. 01-89

IN THE
SUPREME COURT OF THE UNITED STATES

JEROME BROUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

SUPPLEMENTAL BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 01-89

JEROME BROUGH,

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Petition for Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

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SUPPLEMENTAL BRIEF

NEW AUTHORITY SUPPORTING THE GRANT OF PETITIONER'S WRIT OF CERTIORARI

On July 17, 2001, Petitioner, Jerome Brough, filed a Writ of Certiorari on the grounds, among others, that 21 U.S.C. § 841 is unconstitutional after this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). The Seventh Circuit had rejected Petitioner's argument on this issue. *United States v. Brough*, 243 F.3d 1078 (7th Cir. 2001). Petitioner urged this Court to grant

certiorari because this was an important question pursuant to Supreme Court Rule 10(c).

On August 9, 2001, after Petitioner had filed his Writ of Certiorari, the United States Court of Appeals for the Ninth Circuit held that 21 U.S.C. § 841(b)(1)(A) and (B) are unconstitutional under the *Apprendi* decision. *United States v. Buckland*, No. 99-30285, 2001 WL 893440 (9th Cir. (Wash.) August 9, 2001. That opinion is reproduced at Pet. Supp. App. 1a.

The Ninth Circuit squarely addressed the Seventh Circuit decision that is the subject of this Petition, and specifically disagreed with the Seventh Circuit's constitutional analysis and result. (See Supp. App. 15a – 17a.) The key issue to the Ninth Circuit - - and the same one urged by Petitioner to this Court in his Petition - - is that the Seventh Circuit avoided the constitutional question by disregarding the plain, unambiguous language of Section 841.

Plain language is the best indication of the intent of the statute. There is no reasonable doubt from the plain language of Section 841 that Congress intended that facts such as drug quantity were to be sentencing factors, not elements of the substantive offense. Since facts such as drug quantity dramatically affect sentencing (here, they resulted in two concurrent life sentences) it is equally clear that this Court's decision in *Apprendi* renders Section 841(b)(1)(A) and (B) unconstitutional.

In addition to being an important constitutional question meriting review pursuant to Supreme Court Rule 10(c), the Ninth Circuit decision in *Buckland* creates a circuit split that warrants review pursuant to Supreme Court Rule 10(a). The circuit split is with the Seventh Circuit, as well as

the Fifth Circuit (*United States v. Slaughter*, 238 F.3d 580 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2015 (2001)), the Eleventh Circuit (*United States v. Candelerio*, 240 F.3d 1300, 1311 n. 6 (11th Cir. 2001)) and the Tenth Circuit in *United States v. Cernobyl*, ___ F. 3d ____, No. 00-7033, 2001 WL 733406 at *3 (10th Cir. June 29, 2001).

The Ninth Circuit identified each of these decisions, and expressly disagreed with their conclusion that Section 841 is constitutional. (See Supp. App. 15a, fn. 12.)

CONCLUSION

Based on the foregoing, and for those reasons set forth in Petitioner's Writ of Certiorari filed July 17, 2001, Petitioner, Jerome Brough, respectfully requests that this Honorable Court grant the Petition for a Writ of Certiorari.

Dated this 20th day of August, 2001.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CALVIN WAYNE BUCKLAND,

Defendant-Appellant.

No. 99-30285

D.C. No.
CR 4-5073 JET

OPINION

Appeal from the United States District Court for the Western District of Washington
Jack E. Tanner, District Judge, Presiding

Argued and Submitted: August 8, 2000--Seattle, Washington
Submission vacated August 9, 2000
Resubmitted December 4, 2000

Filed August 9, 2001

Before: Betty B. Fletcher and A. Wallace Tashima, Circuit Judges, and Adrian G. Duplantier, District Judge.*
Opinion by Judge Tashima;
Dissent by Judge Duplantier

COUNSEL

Zenon Olbertz, Tacoma, Washington, for the defendant-appellant.

Arlen Storm, Assistant United States Attorney, Seattle, Washington, for the plaintiff-appellee.

OPINION

TASHIMA, Circuit Judge:

Calvin Wayne Buckland appeals the sentence imposed by the district court following his conviction for conspiracy to distribute methamphetamine and possession with intent to distribute methamphetamine, in violation of 21 U.S.C.§§ 841 and 846. After briefing was completed in this appeal, the Supreme Court held that any fact, other than a prior conviction, that increases the prescribed statutory maximum penalty to which a defendant is exposed must be submitted to a jury and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). We subsequently vacated submission and ordered supplemental briefs on the impact of *Apprendi* on this appeal. Buckland then argued that *Apprendi* rendered 21 U.S.C. § 841(b) facially unconstitutional. We have jurisdiction pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291, and we hold that 21 U.S.C. §§ 841(b)(1)(A) & (B) are facially unconstitutional under *Apprendi*.[1] We therefore vacate Buckland's sentence and remand for resentencing under 21 U.S.C. § 841(b)(1)(C).

BACKGROUND

In 1994, Buckland was indicted on one count of conspiracy to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(b)(1)(A) & 846, three counts of possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(l) & (b)(l)(B), and three counts of use of a firearm during a drug trafficking crime, in violation of 18 U.S.C. § 924(c). Count One of the indictment alleged that

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[1] A provision of a statute is facially unconstitutional if "no set of circumstances exists under which the [provision] would be valid." *United States v. Salerno*, 481 U.S. 739, *745* (1987).

the conspiracy involved "one thousand (1000) grams or more of a mixture or substance containing a detectable amount of methamphetamine," but, as was customary, the jury was not instructed that it needed to find that any particular amount of methamphetamine was involved in order to convict on the conspiracy or the possession counts. Buckland was convicted on all seven counts. The district court determined the amount of drugs under the preponderance of the evidence standard and sentenced Buckland to 824 months' imprisonment. On appeal, we affirmed his conspiracy and drug convictions, vacated the firearm convictions under *Bailey v. United States*, 516 U.S. 137 (1995), and remanded for resentencing. *United States v. Buckland*, No. 95-30 147, 1996 WL 632958 (9th Cir. Oct. 28, 1996) (unpublished decision).

On remand, Buckland attempted to raise a number of issues, including whether the district court relied on an inaccurate estimate of the amount of drugs in establishing his base offense level. The district court, however, limited the hearing to a firearm enhancement issue and sentenced Buckland to 360 months' imprisonment. Buckland again appealed, and we held that the remand in the first appeal was a general remand that permitted the district court to consider all of Buckland's sentencing objections. We therefore vacated his sentence and remanded for resentencing. *United States v. Buckland*, Nos. 97-30204, 97-35687, 1998 WL 514852 (9th Cir. Aug. 14, 1998) (unpublished decision). On the second remand, the district court sentenced Buckland to a term of 324 months.

On this appeal, Buckland contends that the district court's findings on the type and quantity of methamphetamine were erroneous, that the court erred in failing to decrease his sentence for acceptance of responsibility, and that his trial counsel rendered ineffective assistance. In his supplemental briefs, as indicated, Buckland contends that his sentence was

imposed in violation of *Apprendi*, and that 21 U.S.C. § 841(b) is facially unconstitutional under *Apprendi*.[2] We agree.

STANDARD OF REVIEW

Because *Apprendi* was decided after Buckland's resentencng, Buckland did not object to the district court's use of the preponderance of the evidence standard in determining the amount of methamphetamine. Our review therefore is for plain error. Fed. R. Crim. P. 52(b). Under the plain error standard, Buckland must establish that there was error, that the error was plain, and that it affected his substantial rights. *United States v. Olano*, 507 U.S. 725, 732 (1993). If these conditions are met, we may exercise our discretion to correct the error only if the error" 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* (quoting *United States v. Young*, 470 U.S. 1, 15 (1985)) (alteration in the original).

ANALYSIS

I.

The issue in *Apprendi* was whether the Due Process Clause of the Fourteenth Amendment requires that a fact authorizing an increase in the maximum prison sentence for an offense must be found by a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 469. In a decision foreshadowing *Apprendi*, the Supreme Court had acknowledged the possible constitutional problems of a statute that would allow an increased penalty based on a fact found by a judge by a

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[2] Because Buckland's case comes before us on direct review, he is entitled to the benefit of *Apprendi's* new rule. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987); *United States v. Nordby*, 225 F.3d 1053, 1059 (9th Cir. 2000).

preponderance of the evidence. *Jones v. United States*, 526 U.S. 227, 242-52 (1999). The Court had avoided the constitutional question, however, by construing the statute at issue, 18 U.S.C. § 2119, the federal carjacking statute, as establishing separate offenses with separate penalties, rather than one offense with sentencing enhancements based on a judicial finding by a preponderance of the evidence. *Id.* at 235, 252. In *Apprendi*, however, the constitutional question was "starkly presented." *Apprendi*, 530 U.S. at 476.

Charles Apprendi was convicted of a firearm for an unlawful purpose, a second-degree offense under New Jersey state law that carried a penalty range of five to 10 years.[3] At his sentencing, the judge sentenced him to 12 years, applying a New Jersey hate crime statute that provided for an "extended term of imprisonment" if the court found, by a preponderance of the evidence, that "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity. "N.J. Stat. Ann. § 2C:44-3(e) (West 2001). The state appeals court and the New Jersey Supreme Court affirmed Apprendi's sentence, finding that the hate crime enhancement was a traditional sentencing factor, and, as such, was not an element of the offense that needed to be found by a jury beyond a reasonable doubt. *Apprendi,* 530 U.S. at 47 1-73.

The United States Supreme Court reversed, holding that the increase in the statutory maximum penalty violated Apprendi's constitutional rights to due process and a jury trial because if "'removde[d] from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'" *Id.* at 490 (quoting *Jones*,

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[3] Apprendi was convicted of three counts, only one of which is relevant here.

526 U.S. at 252 (Stevens, J., concurring)). The Court noted the long history of judges exercising discretion by taking various factors into consideration when imposing a sentence *within* statutory limits. *Id.* at 481. The New Jersey statute, however, unconstitutionally permitted the judge to impose a sentence *above* the statutory maximum, based on a factual finding made by the judge under the preponderance of the evidence standard. *Id.* at 491. The Court thus "confirm[ed] the opinion.. expressed in Jones that,"[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[4] *Id.* at 490.

We applied *Apprendi* in *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000), and held that "the amount of drugs for which a defendant is sentenced under 21 U.S.C. § 841(b)(l) is such a fact." *Id.* at 1056. Nordby's sentence therefore violated *Apprendi* because the drug quantity finding was made by the judge under the less demanding standard, and it increased the penalty beyond the statutory maximum allowable under the facts as found by the jury. *Id.* at 1061-62. We concluded in *Nordby* that we could give no"construction to the statute before us that would avoid the constitutional issue raised by *Apprendi*," because Congress"

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[4] In *Apprendi*, the Court acknowledged that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), may have been incorrectly decided because it permitted a court to increase a defendant's sentence for a prior conviction that was not mentioned in the indictment. 530 U.S. at 489-90. The Court, however, decided not to revisit *Almendarez-Torres*, treating recidivism as a "narrow exception" to the general rule announced in *Apprendi*. *Id.* Thus, although *Apprendi* "casts doubt on the continuing viability of *Almendarez-Torres*," *Almendarez-Torres* remains good law"unless and until [it] is overruled by the Supreme Court." *United States v. Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir. 2000), *amended*, _____ F.3d _____, 2000 WL 33156290 (9th Cir. Feb. 8, 2001), *cert. denied*, 121 S. Ct. 1503 (2001).

clearly intended that drug quantity be a sentencing factor, not an element of the crime under § 841; the statute is not susceptible to a contrary interpretation." *Id.* at 1058.

II.

21 U.S.C. § 841 is part of a "significant history" of determinate-sentencing schemes permitting discretionary sentencing by judges, within limits set by legislatures, based upon sentencing factors deemed relevant by the legislature. *Apprendi*, 530 U.S. at 544 (O'Connor, J., dissenting). Similar to other such schemes, *see, e.g.*, 21 U.S.C.§ 960, § 841 describes "unlawful acts," traditionally viewed as the elements of the offense, in subsection (a), and 'penalties," traditionally viewed as sentencing factors, in subsection (b). The penalties are based on the type and quantity of drugs, although subsection (b)(l)(C) imposes a 20-year maximum sentence for an undetermined amount of schedule I or II drugs.[5]

Justice O'Connor's dissent in *Apprendi* recognized that the majority's "reasoning strongly suggests" that federal determinate-sentencing schemes, such as that found in § 841, are not constitutional. *Apprendi*, 530 U.S. at 550-51 (O'Connor, J., dissenting); *see also Id.* at 544 (stating that, "in light of the adoption of determinate-sentencing schemes by many States and the Federal Government, the consequences of the [majority's] rules in terms of sentencing schemes invalidated by today's decision will likely be severe"). Justice Breyer also expressed concern that "the majority's rule creates serious uncertainty about the constitutionality of such statutes and about the constitutionality of the confinement of those punished under them." *Id.* at 565 (Breyer, J., dissenting). After examining § 841(b) with the usual tools of statutory construction, such as

[5] Methamphetamine is a schedule II drug. C.F.R. § 1308.12(d).

the statute's structure and legislative history, as well as under the rule announced in *Apprendi*, we agree with Justices O'Connor and Breyer that the majority rule in *Apprendi* renders the determinate-sentencing scheme in § 841(b) unconstitutional.[6]

We note first that, as the government acknowledges, the sentence imposed by the district court constitutes error because it is longer than 20 years, the statutory maximum penalty under § 841 (b)(1)(C) for a conviction with no jury determination of the quantity of drugs. We also note that, as was customary prior to *Apprendi*, the jury instructions given by the district court did not require the jury to find the amount of methamphetamine.[7] Similarly, the jury verdict

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[6] Although the majority opinion noted the dissent's "lengthy disquisition of the benefits of determinate sentencing schemes, and the effect of today's decision on the federal Sentencing Guidelines," the opinion responded that the Guidelines were not before the Court, but was silent about determinate sentencing schemes. 530 U.S. at 497 n.21.

[7] The jury instruction on the possession counts stated:

> The defendant is charged in Counts 2, 4 and 6 of the superseding indictment with possession with intent to distribute methamphetamine, in violation of Section 841(a)(1) of Title 21 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:
>
> *First*, that on or about the date alleged, the defendant knowingly possessed, or aided and abetted the possession of, a mixture or substance containing methamphetamine; and
>
> *Second*, that the defendant did so with the intent to deliver it to another person.
>
> It does not matter whether the defendant knew that the substance was methamphetamine. It is sufficient that the defendant knew that it was some kind of a prohibited drug.

form merely stated, "guilty as charged" on each count and did not contain any finding of the amount of methamphetaniine. For these reasons, Buckland's sentence violates *Apprendi*.

III.

Apprendi teaches us that "'[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'" 530 U.S. at 490 (quoting *Jones v. United States*, 526 U.S. 227, 252 (1999) (Stevens, J., concurring)). *Nordby* held that § 841 was not susceptible to an interpretation other than that Congress intended drug quantity to be a sentencing factor, not an element of the offense under § 841. 225 F.3d at 1058. Applying *Apprendi* to the statute as *Apprendi* renders §§ 841 (b)(1)(A) and (B) unconstitutional because they permit the judge to find a fact, the quantity of drugs, under the preponderance of the evidence standard that increases the maximum penalty to which a defendant is exposed.

We begin by examining the structure of § 841.[8] Subsection 841(a), entitled "Unlawful acts," sets forth the elements of the offense, providing that "it shall be unlawful for any

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The instruction on the conspiracy count merely described the requirements of finding a conspiracy and did not mention the amount of methamphetamine.

[8] Although the structure of the statute may not be dispositive, "'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute." *Almendarez-Torres*, 523 U.S. at 234 (quoting *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528-29 (1947)). *But cf. Jones*, 526 U.S. at 233 (stating that "[t]he 'look' of[18 U.S.C. § 2119]... is not a reliable guide to congressional intentions")

person knowingly or intentionally -- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance." Subsection 841(b) is entitled "Penalties," and it provides that "any person who violates subsection (a) of this section shall be sentenced as follows. "It then provides for penalties based upon factors traditionally determined by the sentencing judge by a preponderance of the evidence--the amounts and types of drugs, along with increased penalties if death or serious bodily injury results, or if the defendant has a prior conviction for a felony drug offense. Under this structure, only subsection (a) can be violated. Subsection (b) only provides the penalties for a violation of subsection (a).

The penalties in §§ 841(b)(l)(A) and (b)(l)(B) depend on the quantity of each drug involved; however, as stated above, § 841 (b)(1)(C) provides a 20-year maximum sentence for an indeterminate amount of schedule I or II drugs (provided that the death or serious bodily injury enhancement and the prior conviction do not apply). Subsection 841(b)(l)(D) provides a five-year maximum for, *inter alia*, schedule III controlled substances.[9] On its face, therefore, § 841 differentiates

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[9] Buckland argues that drug type is an "enhancement element" that should be pleaded in the indictment and proven at trial. He argues that it was not, and that he should accordingly be sentenced under the subsection of § 841 that provides the lowest statutory maximum sentence, subsection (b)(1)(D). We disagree that he should be sentenced under subsection (b)(l)(D), because it is inapplicable to his case. Subsection (b)(l)(D) deals with small quantities of marijuana or hashish, and with controlled substances in schedules III, IV, and V. Methamphetamine is a Schedule II substance. 21 C.F.R. § 1308.12. Moreover, Buckland fails to raise the argument clearly, and so we decline to address the issue. *Cf. United States v. Viramontes-Alvarado*, 149 F.3d 912, 916 n.2 (1998) (declining to consider an issue "not specifically and distinctly argued" in the appellant's opening brief).

between the elements of the offense and the prescribed penalties.

We recognize that the statute at issue in *Apprendi* explicitly permitted the imposition of the hate crime enhancement based upon a finding by the court by a preponderance of the evidence, whereas § 841 does not explicitly state that the court may find the drug quantity by a preponderance of the evidence. *See* N.J. Stat. Ann. § 2C:44-3(e). This is an insufficient basis, however, on which to distinguish § 841. The fact that the New Jersey Legislature made its intent explicit, and that Congress did not, does not give us "the prerogative to ignore the legislative will in order to avoid constitutional adjudication." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986) ("CFTC"). *Nordby* has already held that Congress clearly intended to allow a judge to determine drug quantity under § 841 under a preponderance of the evidence standard.[10] 225 F.3d at 1058. Moreover, the language of the statute, providing that "any person who violates subsection (a) of this section shall be sentenced as follows," indicates Congress' intent that the penalties be determined by the judge at sentencing. The structure and legislative history of § 841 further indicate Congress' intent that the quantity of drugs be a sentencing factor, not an element of the offense.

The statute is now and always has been structured by defining the offense in subsection (a) and the penalties in subsection (b). *See, e.g.*, Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-5 13, § 401, 84 Stat. 1260 (codified, as amended, at 21 U.S.C. §

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[10] A three-judge panel cannot reconsider or overrule the decision of a prior panel, absent an intervening Supreme Court decision that has undermined the precedential value of that authority. *United States v. Hanley*, 190 F.3d 1017, 1023 (9th Cir. 1999); *United States v. Gay*, 967 F.2d 322, 327 (9th Cir. 1992).

841). The legislative history of the statute clearly differentiates between violations and criminal penalties. *See, e.g.*, HR. Rep. No. 91-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4570, 4575. Particularly telling is that, in describing the penalties section, the legislative history notes that, "[t]he foregoing *sentencing procedures* give maximum flexibility to *judges*, permitting them to tailor the period of imprisonment, as well as the fine, to the circumstances involved in the individual case." *Id.* at 4576 (emphasis added).

In 1970, the penalties depended on the type of drugs, rather than the amount of drugs. Pub. L. No. 91-5 13, § 401; *see also* H.R. Rep. No. 9 1-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4576 (stating that the penalties vary, "depending upon the danger of the drugs involved"). In 1983, however, Congress recognized that, "[w]hile it is appropriate that the relative dangerousness of a particular drug should have a bearing on the penalty for its importation or distribution, another important factor is the amount of the drug involved." S. Rep. No. 98-225, at 255 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3437. Congress therefore amended § 841 to provide greater penalties for offenses involving larger amounts of drugs. *Id.* at 258, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3440. The drug quantity determination, therefore, was placed in the penalties section, which Congress had already described as containing sentencing procedures for the judge.[11] *Cf.* H.R. Rep. No. 101-681(I), at 110 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6514-15 (noting the need for judges to have "flexibility when fashioning a sentence" under § 841(b)).

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[11] Further evidence that Congress intended the penalties section to constitute sentencing factors, rather than elements of the offense, is its inclusion in the penalties section of an enhancement for a prior felony drug offense conviction, which is "as typical a sentencing factor as one might imagine." *Almendarez-Torres*, 523 U.S. at 230.

The structure of the statute itself and the legislative history clearly evince congressional intent that drug quantity be a sentencing factor, not an element of the offense. In *Apprendi*, however, the Court described the distinction between elements and sentencing factors as "constitutionally novel and elusive." 530 U.S. at 494. We therefore examine § 84 1(b) in light of what the Court described as "the relevant inquiry," that is, the effect, rather than the form, of the factor --"does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* The answer is yes. Subsections 841(b)(l)(A) and (B) permit the judge to find a fact, the quantity of drugs, that increases the maximum sentence beyond the 20-year maximum in § 841(b)(1)(C) that may be imposed for an unspecified amount of drugs. They therefore "remove[] the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 482-83. The district court's finding that Buckland was responsible for eight kilograms of methamphetamine increased his potential maximum sentence from 20 years, based on the jury finding of an unspecified amount of methamphetamine, to life imprisonment. This differential is "unquestionably of constitutional significance. "*Id.* at 495 (describing the differential between a potential maximum sentence of 10 years and 20 years). Under the "relevant inquiry" set forth in *Apprendi*, therefore, we are unable to avoid the conclusion that § 841(b) is unconstitutional.

We further note that the Court distinguished *Almendarez-Torres* on the basis that recidivism, the sentencing factor at issue in *Almendarez-Torres*, did not relate to the commission of the offense itself, whereas the "biased purpose inquiry goes precisely to what happened in the 'commission of the offense.' "*Id.* at 496 (quoting *Almendarez-Torres*, 523 U.S.

at 244). Similarly here, the amount of drugs cannot be said to be unrelated to the commission of the offense. Rather, a large amount of drugs makes the offense more dangerous; this is precisely why Congress amended the statute to allow increased penalties depending on the amount of drugs involved. S. Rep. No. 98-225, at 255 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3437. The amount of drugs therefore "goes precisely to what happened in the commission of the offense." 530 U.S. at 496 (internal quotations omitted).

We recognize the maxim that "constitutionally doubtful constructions should be avoided where 'fairly possible.'" *Miller v. French*, 530 U.S. 327, 336 (2000) (quoting *Communications Workers v. Beck*, 487 U.S. 735, 762 (1988)). "It is equally true, however, that this canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication; '[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute...' or judicially rewriting it." *CFTC*, 478 U.S. at 841 (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964)); *see also Miller* 530 U.S. at 336 (noting the principle that, "where Congress has made its intent clear, 'we must give effect to that intent'" (quoting *Sinclair Refimnn Co. v. Atkinson*, 370 U.S. 195, 215 (1962)). We cannot, therefore, follow the lead of the Seventh Circuit, which has overruled its precedent holding that drug quantities under § 841(b) are "always a sentencing factor." *United States v. Nance*, 236 F.3d 820, 825 (7th Cir. 2000), *petition for cert. filed* (U.S. Apr. 24, 2001) (No. 00-9633); *see also United States v. Westmoreland*, 240 F.3d 618, 632 (7th Cir. 2001) (discussing *Nance*). For the same reason, we cannot agree with the Seventh Circuit's holding in *United States v. Brough*, 243 F.3d 1078 (7th Cir. 2001), that

Apprendi does not render § 841 unconstitutional.[12]

In *Brough*, the court reasoned that the statute does not explicitly state that the type and quantity of drugs are to be determined by the judge by a preponderance of the evidence. *Id.* at 1079. The court further reasoned that:

> [i]nstead the law attaches effects to facts, leaving it to the judiciary to sort out who determines the facts, under what burden. It makes no constitutional difference whether a single subsection covers both elements and penalties, whether these are divided across multiple subsections (as § 841 does), or even whether they are scattered across multiple statutes (see 18 U.S.C. §§ 924(a), 1963). *Apprendi* holds that the due process clauses of the fifth and fourteenth amendments make the jury the right decision-maker (unless the defendant elects a bench trial), and the

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[12] In *United States v. Slaughter*, 238 F.3d 580 (5th Cir. 2001), *cert. denied*, 121 5. Ct. 2015 (2001), the Fifth Circuit rejected a facial constitutional challenge to § 841, stating, without discussion, that "[w]e see nothing in the Supreme Court decision in *Apprendi* which would permit us to conclude that 21 U.S.C. §§ 841(a) and (b), 846, and 860(a) are unconstitutional on their face." *Id.* at 581. *See also United States v. Fort*, 248 F.3d 475, 483 (5th Cir. Apr. 17, 2001) (relying on *Slaughter* to reject argument that §§ 841(a) and (c) are facially unconstitutional in light of *Apprendi*); *United States v. Candelario*, 240 F.3d 1300, 1311 n.16 (11th Cir. 2001) (finding, without explanation, the defendant's facial challenge to the constitutionality of §§ 841 and 846 to be without merit), *cert. denied*, 121 S. Ct. 2535 (2001). The Tenth Circuit has also rejected a facial challenge to § 841, reasoning that its pre-Apprendi cases holding that drug quantity is a sentencing factor are no longer of precedential value, and that § 841 does not address procedures for determining drug quantity. *United States v. Cernobyl*, _____ F.3d _____, No. 00-7033, 2001 WL 733406, at *3 (10th Cir. June 29, 2001). For the reasons discussed above, we cannot agree with the Tenth Circuit.

> reasonable-doubt standard the proper burden, when a fact raises the maximum lawful punishment. How statutes are drafted, or implemented, to fulfil that requirement is a subject to which the Constitution does not speak.

Id.

We disagree with the Seventh Circuit for several reasons.

First, although we should construe a statute to avoid "serious constitutional problems, "we cannot do so if such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, *575* (1988). For the reasons already discussed, construing § 841(b) as containing elements of the offense rather than sentencing factors is "plainly contrary to the intent of Congress." *Cf. United States v. Kelly*, 105 F. Supp. 2d 1107, 1115 (S.D. Cal. 2000) (reasoning that"congressional idleness in the face of voluminous precedent" that § 841(b) contains sentencing factors, not elements, indicates Congress' agreement). Furthermore, we are bound by *Nordby*, which has already held that § 841(b) is not susceptible to the interpretation that it contains elements of the offense. *See* 225 F.3d at 1058.

Second, the analysis in *Brough* does not acknowledge the role of congressional intent in evaluating the constitutionality of a statute. Whether Congress intended drug quantity to be a sentencing factor rather than an element of the offense is integral to the question. Cf. E.g., *Jones*, 526 U.S. at 232 (in construing 18 U.S.C. § 2119, the Court reasoned that "[m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted

to a jury, and proven by the Government beyond a reasonable doubt"). Indeed, in two cases decided shortly before *Apprendi*, the Supreme Court's statutory analysis focused on determining legislative intent. *See. e.g., Castillo v. United States*, 530 U.S. 120, 123 (2000) (identifying the question presented as "whether Congress intended the statutory references to particular firearm types in [18 U.S.C.] § 924(c)(l) to define a separate crime or simply to authorize an enhanced penalty"); *Jones*, 526 U.S. at 232-40 (examining statute's structure and history, as well as similar statutes passed by Congress, in order to determine congressional intent on whether factor was element of offense or sentencing consideration); *see also Almendarez-Torres*, 523 U.S. at 228 (stating that the question of which factors are elements of an offense and which are sentencing factors is "normally a matter for Congress," and, accordingly, looking to the statute and to congressional intent to analyze the statute). *Apprendi* seems to eschew the distinction between sentencing factors and elements in favor of its "relevant inquiry" of the effect of the factor; the Court, however, did not go as far as to abolish the distinction. *See Apprendi*, 530 U.S. at 494. Moreover, even if the sentencing factor versus element distinction is not dispositive, § 841 violates the constitutional requirement set forth in *Apprendi* that a fact, other than a prior conviction, that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and proven beyond a reasonable doubt. *Id.* at 490.

Nor do we think there is a middle road, by which drug quantity is sometimes an element of the offense that must be proven to the jury beyond a reasonable doubt, and sometimes a sentencing factor that the judge can decide by a preponderance of the evidence. *Cf. Horton v. United States*, 244 F.3d 546, 552 (7th Cir. 2001) (concluding that, although drug type is not an element of the offense, it "is sometimes a

factor that must be determined by a jury--when such a determination will increase the maximum penalty authorized by statute," citing *Apprendi*). Regardless of whether the Supreme Court intended to abolish the distinction between offense elements and sentencing factors, the fact remains that quantity must either be submitted to the jury and proven beyond a reasonable doubt, or it is a factor that can be decided by the sentencing judge. This approach, of requiring it to be proven to the jury only if the resulting sentence will be beyond the statutory maximum, but allowing it to be decided by the judge if it is not, is unworkable. As a practical matter, the prosecutor will always have to submit drug quantity to the jury. This raises the problem articulated by Justice Breyer in *Apprendi*, where he stated that, "to require jury consideration of all such [sentencing] factors--say, during trial where the issue is guilt or innocence--could easily place the defendant in the awkward (and conceivably unfair) position of having to deny he committed the crime yet offer proof about how he committed it, *e.g.*, 'I did not sell drugs, but I sold no more than 500 grams.'" *Apprendi*, 530 U.S. at 557 (Breyer, J., dissenting); *Cf. Jackson*, 207 F.3d at 921 (raising a similar problem, "[i]f a jury were required to determine whether the defendant had distributed 3, 6, 49, or 52 grams of mixture or substance containing crack, its attention would be deflected from the question at once more fundamental to culpability and more manageable by a lay factfinder whether the defendant had distributed a forbidden substance").

IV.

As noted above, Buckland's claim is reviewed for plain error because he did not object to the district court's determination of the drug quantity under the preponderance of the evidence standard. Fed. R. Crim. P. 52(b); *Nordby*, 225 F.3d at 1060. Buckland therefore must establish that there was error, that

the error was plain, and that the error affected his substantial rights. *Olano*, 507 U.S. at 732. Under *Apprendi*, the district court erred by sentencing Buckland on the basis of a drug quantity finding that was not submitted to a jury and established beyond a reasonable doubt, and the error is plain. *See Nordby*, 225 F.3d at 1060. Because we conclude that §§ 841 (b)(1)(A) and (B) are unconstitutional, the maximum sentence that can be imposed on Buckland for possession of an undetermined amount of methamphetamine is 20 years, under § 841 (b)(l)(C). Buckland's sentence of 27 years thus affected his substantial rights.[13] Imposing a sentence that is seven years more than the maximum sentence constitutionally permitted under the facts as found by the jury undoubtedly "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[14] *See Nordby*, 225 F.3d at 1061-62.

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[13] *Nordby* declined to decide which of two approaches should be used to determine whether an *Apprendi* error affected a defendant's substantial rights—weighing the extra sentence imposed upon the defendant, or examining whether a jury would have found the defendant guilty absent the error. *Nordby* 225 F.3d at 1060. We need not address the issue either because we conclude that, in a case such as this one, where the defendant has been sentenced under an unconstitutional statute, weighing is inappropriate; thus, neither approach applies. Because §§ 841(b)(1)(A) and (B) are facially unconstitutional, *any* sentence over the twenty-year maximum in § 841(b)(1)(C) affects a defendant's substantial rights.

[14] The government argues that the *Apprendi* error did not "seriously affect[ ] the fairness, integrity or public reputation of judicial proceedings," *Olano*, 507 U.S. at 732 (internal quotations omitted), because the 27-year sentence Buckland received could have been achieved by imposing consecutive sentences, regardless of the quantity of drugs. This argument has been rejected by *Apprendi*. *See* 530 U.S. at 474 (rejecting the argument that the judge could have imposed consecutive sentences to achieve the same prison term that Apprendi received).

V.

Because we conclude that §§ 841(b)(l)(A) and (B) are unconstitutional, we must consider whether they are severable from the remainder of the statute. *Bd. of Natural Res. v. Brown*, 992 F.2d 937, 947 (9th Cir. 1993). The first question in the inquiry is whether the statute is "fully operative" after the unconstitutional provisions have been excised. *Id.* at 948. The elimination of §§ 841(b)(1)(A) and (B)" 'in no way alters the substantive reach of the statute and leaves completely unchanged its basic operation' "because a defendant can still be convicted under § 841(a) and sentenced under § 841(b)(l)(C) to a maximum of twenty years' imprisonment, regardless of the amount of a schedule I or II controlled substance he or she possessed. *Id.* (quoting *United States v. Jackson*, 390 U.S. 570, 586 (1968)). The second question is whether Congress would have enacted the constitutional provisions of the statute independently of the unconstitutional provisions. *Id.* Congress clearly would have enacted the remaining penalty provisions in visions of the statute independently of the unconstitutional provisions. *Id.* Congress clearly would have enacted the remaining penalty provisions in § 841(b) in order for the sentencing court to sentence a defendant convicted of a violation of § 841(a). Having thus satisfied both inquiries, we conclude that §§ 841 (b)(1)(A) and (B) are severable from the remainder of the statute.

CONCLUSION

The maximum sentence authorized by the jury's verdict for an undetermined amount of methamphetamine was 20 years under § 841(b)(l)(C). Buckland's sentence of 27 years, accordingly, was plain error, and it affected his substantial rights. We thus vacate Buckland's sentence and remand for resentencing under § 841 (b)(1)(C).

VACATED and REMANDED.

DUPLANTIER, District Judge, Dissenting:

I respectfully dissent. I agree with the reasoning of the Seventh Circuit in *United States v. Brough*, 243 F.3d 1078 (7th Cir. 2001).